LIBRARY
SUPREME COURT. U. S.

FILED
MAR 19 1958
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 766

FRANK E. CANTWELL,

Appellant,

vs.

CLOTILDA ALLEN CANTWELL,

Appellee.

APPEAL FROM THE SUPREME COURT OF INDIANA.

APPELLANT'S BRIEF IN REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM, WITH CERTIFICATE OF SERVICE.

WILLIAM C. WINES,
160 N. LaSalle Street, Suite 900,
Chicago (1), Illinois,
JOHN C. LAWYER,
STANLEY A. TWEEDLE,
EDWIN H. FRIEDRICH,
BERNARD A. PETRIE,
5217 Hohman Ave.
Hammond, Indiana.
Attorneys for Appellant.

INDEX.

PAGE

I—The Court's opinion sustained the efficacy of the substituted process in this case as against appellant's Federal constitutional objections 1

II—The opinion of the Supreme Court of Indiana requires appellant not only to allege but to prove that he has a meritorious defense to appellee's case 5

III—The questions presented affect innumerable judgments, not only in matrimonial cases but in all other types of cases. They would be of sufficient importance to elicit certiorari even if a direct appeal were not appropriate 6

CASES CITED.

Armstrong vs. Armstrong, 350 U. S. 568 3

Dobbins vs. McNamara, 113 Ind. 54, 14 N. E. 887 4

Estin vs. Estin, 334 U. S. 541 3

Garrison vs. Miller, 62 Ind. App. 485 4

Griffin vs. Griffin, 327 U. S. 220 3

Halvey vs. Halvey, 330 U. S. 610 3

May vs. Anderson, 345 U. S. 528 3

Staub vs. City of Banley, not yet reported, this Court's No. 48, of the instant term 3

Vanderbilt vs. Vanderbilt, 354 U. S. 416 3

IN THE

Supreme Court of the United States

OCTOBER TERM, 1957.

No. 766

FRANK E. CANTWELL,

Appellant,

vs.

CLOTILDA ALLEN CANTWELL,

Appellee.

APPEAL FROM THE SUPREME COURT OF INDIANA.

APPELLANT'S BRIEF IN REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM, WITH CERTIFICATE OF SERVICE.

I.

The Court's opinion sustained the efficacy of the substituted process in this case as against appellant's Federal constitutional objections.

The opinion of Mr. Justice Landis was concurred in by Mr. Justice Bobbett, Mr. Chief Justice Arterburn, with an independent opinion in which Mr. Justice Achor concurred, and by Mr. Justice Emmert, with opinion.

The effect of that opinion, as has been correctly explained in the Jurisdictional Statement, was to impart such efficacy to the substituted process in this case as to require appellant to assert a defense to the merits of appellee's claim although he had quitted Indiana for permanent residence in California and although he no longer lived in the house at which the copy of summons was left.

To be sure, Chief Justice Arterburn ventures as "a more cogent reason for the decision of the trial court" his view that "principles of waiver and estoppel are applicable here." But whether couched in terms of a categorical requirement that appellant assert a meritorious defense or "in terms of waiver and estoppel", the dominating factor in the court's view is that appellant was required to assert a defense to the merits before assailing Indiana's attempt to exert sovereignty over his person, children and property after he had permanently left Indiana and by virtue of process left at a home that he no longer inhabited.

Appellee would beg the constitutional question of Indiana's sovereignty, jurisdiction and process in this Court by arguing that such matters as "waiver and estoppel" are purely matters of State law.

But the question presented is the extent of Indiana's sovereignty and the existence of her jurisdiction over appellant, he having left Indiana for residence in California and having been served only by substituted process at the house that he had left. If sovereignty does not extend to him and jurisdiction does not subsist over him without valid process, such sovereignty can not be generated and such jurisdiction can not be created by the *fiat* of any doctrine of "waiver and estoppel".

To put the matter in another way, a Federal question is precipitated by the declaration that "waiver and estoppel" were sufficient to silence appellant's assertion of a Federal

constitutional question as to Indiana's jurisdiction; *for if Indiana had no jurisdiction over his person, his children or his property, then it had no jurisdiction to exert against him the principles of "waiver and estoppel"!* As recently as *Staub* v. *City of Banley*, not yet reported, this Court's No. 48 of the instant term, this Court held that a State may not abort the right of a litigant to raise a Federal constitutional question by trammeling that right with requirements of State law that in effect prevent the assertion and preservation of the Federal constitutional question.

In short, the Indiana Supreme Court has said in effect, "Even though appellant may not have been subject to Indiana's sovereignty, even though he may not have been personally served and even though he has denied Indiana's jurisdiction over him, his children and his property upon these Federal grounds, he is precluded by estoppel or otherwise, from asserting these Federal infirmities against Indiana's exertion of power over him."

The cases cited by appellant,

Griffin v. *Griffin*, 327 U. S. 220,
Vanderbilt v. *Vanderbilt*, 354 U. S. 416,
May v. *Anderson*, 345 U. S. 528,
Estin v. *Estin*, 334 U. S. 541,
Armstrong v. *Armstrong*, 350 U. S. 568,
and
Halvey v. *Halvey*, 330 U. S. 610,

are all incisive in their application to this case.

Appellee makes no effective reply whatever to appellant's demonstration that no alleged agreement of the parties that a husband will remain within the jurisdiction can extend Indiana's sovereignty over his person, children and property if in fact he becomes a non-resident. In *May* v. *Ander-*

son, 345 U. S. 528; the wife left Wisconsin in violation of an admitted agreement. Nor does appellee make effective reply to appellant's demonstration that jurisdiction depends upon the validity of process, not upon informal agreements between the parties.

Appellee's agreement begs the very question upon which appellant had a right to be heard, namely, whether he had been properly served in a suit charging the informal agreement to remain within the jurisdiction and whether Indiana's Sovereignty extended to him, his children and property.

If the Indiana court's reasoning is sound, all that a litigant would have to do to obtain a judgment for divorce or other relief would be to sue a resident of a distant state and, without effecting personal service, allege that the defendant's non-residence was in violation of an agreement. Such an allegation would require the defendant in effect to enter a general appearance, submit himself to the sovereignty that he desired to challenge, and in effect, to waive the defense of want of jurisdiction.

It appears from the affidavit of appellant (*Appellee's Brief in Supreme Court of Indiana*, pp. 32-35) that appellee "without just cause, deserted and departed from his residence on January 2, 1953" after she had "steadfastly refused to return to him or to move with him to the State of California." It further appears by that affidavit that appellant notified her that he "was severing all residence and domicile in the State of Indiana and was moving to the State of California and he urged her to accompany him, and that he again notified her by letter that he had severed legal residence and domicile in June, 1953."

It thus appears that appellee was fully apprised of appellant's intention to quit Indiana as his residence and to remove to California.

Until the present decision, Indiana has steadfastly recognized the rule that a judgment that is absolutely void for want of jurisdiction, "is not a question of excusable neglect nor meritorious defense but one of power and authority to render the judgment." (*Garrison* v. *Miller,* 62 Ind. App. 485.) See also *Dobbins* v. *McNamara,* 113 Ind. 54, 14 N. E. 887, where it is declared that "where a default has been taken against a person upon whom there was no service of process and over whose person the court has acquired no jurisdiction, he is entitled to have judgment set aside whether he has a good defense to the action or not."

It therefore appears that until the present opinion, Indiana has recognized the general rule that a judgment or decree void for want of jurisdiction can be set aside at any time without regard to the presence or absence of a meritorious defense.

II.

The opinion of the Supreme Court of Indiana requires appellant not only to allege but to prove that he has a meritorious defense to appellee's case.

Appellee argues at pages 11 and 12 of her Motion to Dismiss or Affirm that appellant need only plead but need not prove the existence of a meritorious defense.

This contention is apparently inadvertent. It overlooks the explicit language of the opinion of Landis, J., concurred in by Arterburn, C. J., and Bobbett and Emmert, JJ., the following:

> "We recognize the unquestioned general weight of authority that a judgment-defendant who seeks to vacate a judgment on account of want of service of

> process, the record not showing any appearance to the action, must allege *and prove* that he has a meritorious defense to the cause of action on which the judgment was rendered." (Emphasis supplied.)

In other words, the Supreme Court of Indiana has held directly and squarely that before appellant may challenge Indiana's sovereignty and jurisdiction over him, his children and property, he must, in that Court's language, "allege *and prove* a meritorious defense to the cause of action on which the judgment was rendered." In short, the Supreme Court of Indiana has held that a wife may obtain a default decree for divorce against a husband who has left the jurisdiction and upon substituted service and may entail upon the husband the burden of proof, not only as to jurisdictional elements of the case, but as to the merits as a prerequisite even to raising Federal jurisdictional questions.

This holding raises a substantial Federal question as to the validity of the statutes under which the process was issued, as to the existence of Indiana's sovereignty over the marriage and the post-marital rights of the parties and as to the existence of Indiana's jurisdiction.

III.

The questions presented affect innumerable judgments, not only in matrimonial cases but in all other types of cases. They would be of sufficient importance to elicit certiorari even if a direct appeal were not appropriate.

Appellee says that "the case at bar is not a case of any widespread importance, is not a case in which the decision might, or could affect the rights of any substantial number of other litigants, and is not a case which involves any constitutional or Federal issues which might justify the time of this court."

Actually, however, any one of the opinions of the Indiana Supreme Court declares that a wife may sue a spouse who has left the State, may effect substituted service upon him and may obtain a decree not only sundering the marriage but bestowing upon her and the children and allowing to her substantial property rights and may require the husband, as a prerequisite to attacking such judgment, to "allege and prove a meritorious defense."

Such a holding would be of grave moment if it were confined to matrimonial causes alone. But if a holding is valid as to matrimonial causes, it is valid as to *any* sort of judgment, whether affecting status, rights usually classed as *in rem*, rights usually classed as *in personam* or otherwise.

Even if Indiana had not sustained the efficacy of her process under her statutes as against appellant, these questions would be of sufficient moment to evoke *certiorari*.

Respectfully submitted,

WILLIAM C. WINES,
160 N. LaSalle Street, Suite 900,
Chicago (1), Illinois,
JOHN C. LAWYER,
STANLEY A. TWEEDLE,
EDWIN H. FRIEDRICH,
BERNARD A. PETRIE,
5217 Hohman Ave.
Hammond, Indiana.
Attorneys for Appellant.

Certificate of Service.

I, William C. Wines, one of the attorneys for appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on or before the eighteenth day of March, 1958, I served copies of the foregoing Appellant's Brief in reply to Appellee's Motion to Dismiss or Affirm, on the appellee, as follows:

By mailing of five copies of said Appellant's Brief in Reply to

DANIEL F. KELLY,
JOHN F. BECKMAN, JR.,
ALFRED J. LINK,
708 CALUMET BLDG.,
HAMMOND, INDIANA,

in duly addressed envelope, postage prepaid.

WILLIAM C. WINES,
One of Attorneys for Appellant,